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Robert E. Corbin

January 22, 1990

Ms. Nell Evans
Special Assistant
Office of the Governor
State Capitol - West Wing
Phoenix, Arizona 85007

Re: I90-013 (R89-151)

Dear Ms. Evans:

You have asked a number of questions concerning the establishment of the Occupational Therapy Examiners Board (Board), created in Laws 1989 (1st Reg. Sess.) Ch. 296, § 6. In the following responses to your questions, we conclude that the Governor does not have the authority to appoint Board members pursuant to A.R.S. § 32-3402(A) prior to the effective date of the legislation, June 30, 1990. See Laws 1989 (1st Reg. Sess.) Ch. 296, § 10. We conclude that, although Board members may not be appointed prior to June 30, 1990, the Governor may appoint an advisory board or committee to assist in drafting tentative rules and a budget for the Board. However, the Governor may not fill the position of Executive Director for the Board prior to the effective date of the legislation. We also conclude that individuals serving on the advisory committee would not be permitted to receive reimbursement for travel expenses incurred in 1989-1990 from the \$25,000 start-up costs appropriated by legislation to the Board for fiscal year 1990-91, pursuant to Laws 1989 (1st Reg. Sess.) Ch. 296, § 11. We conclude that proceedings by the advisory board are subject to Arizona's Open Meeting Law, A.R.S. § § 38-431 to -431.09. Finally, we conclude that the Governor may subsequently appoint members of an advisory board to the Occupational Therapy Examiners Board.

- First, you have asked whether the Governor has the authority to appoint Board members pursuant to A.R.S. § 32-3402(A) prior to the effective date of the legislation, June 30, 1990. The Board was created by Laws 1989 (1st Reg. Sess.) Ch. 296, § 6 [enacting new sections 34-3401 to -3445, Arizona Revised Statutes]. The Act states that the new legislation "is effective from and after June 30, 1990." *Id.* at § 10. A.R.S. § 1-241(B) provides that "[a]n act or statute, which by its terms is to take effect from and after a specified day, shall take effect at midnight of the day specified." Further, "[n]o statute is retroactive unless expressly declared therein." A.R.S. § 1-244. See also *Merchants Despatch Transportation Corp. v. Arizona State Tax Commission*, 20 Ariz. App. 276, 279, 512 P.2d 39, 42 (1973) ("Generally, statutes and their amendments take effect on the date of enactment or on their effective dates.") The Governor derives authority to appoint five members to the Board from § 32-3402(A) of this new legislation. Because the statute will not be effective prior to June 30, 1990, the Governor has no authority to appoint Board members prior to that time. See *Litchfield Elementary School District No. 79 v. Babbitt*, 125 Ariz. 215, 220, 608 P.2d 792, 797 (App. 1980) ("the governor, or executive, has only such powers as are conferred upon him by our constitution or by validly enacted statute.")

You have also inquired whether the Governor has authority to appoint an advisory board to assist in, among other things, the drafting of tentative rules and a proposed budget to be offered for the Board's consideration upon its establishment. Although the Governor's authority to appoint advisory boards and committees is not expressly enumerated in A.R.S. § 41-101 (powers and duties of the Governor), the power to appoint advisory committees has been provided by the Legislature in A.R.S. § 41-106 ("Members of an advisory board established by the governor are eligible, subject to legislative appropriation, for reimbursement of expenses pursuant to [A.R.S. § § 38-621 to -627].") See also Ariz. Att'y Gen. Op. No. 77-163. The Governor's Office has in the past established such committees by executive order. See, e.g., Japanese Baseball Committee Executive Order No. 89-13, reprinted in Ariz. Legis. Serv. (West) Vol. 6 at A-5 (July, 1989). Therefore, we conclude that the Governor has authority to issue an executive order to establish an advisory board or committee.

While general authority to appoint an advisory committee does exist, the Governor may not by executive order override the Legislature's intent to create the Board effective June 30, 1990. See *Litchfield Elementary School District No. 79 v. Babbitt*, 125 Ariz. at 220, 608 P.2d at 797; Ariz. Att'y. Gen. Op. No. 77-163. Therefore, noting the limitations inherent in

the Governor's powers through executive orders, we conclude that an advisory committee may act only in an advisory capacity and may not usurp authority which the Legislature has reserved for the Board at its inception on June 30, 1990. See, e.g., Vansickle v. Shanahan, 212 Kan. 426, 511 P.2d 223, 241-242 (1973) (executive orders cannot "have the effect of adding to executive functions, extending agencies or functions beyond their scheduled date, [or] requiring additional revenues or appropriations. . . .")

You have asked about an advisory committee's authority to act in a number of situations. A committee would be permitted to draft tentative rules for consideration by the Board. Indeed, A.R.S. § 41-1033 provides that "[a]ny person . . . may petition an agency requesting the adoption of a rule." (Emphasis added.) The Board once appointed, however, would in no way be obligated to adopt those rules. Similarly, the committee could draft a proposed budget for consideration by the Board. On the other hand, the committee would have no authority to establish and fill the position of Executive Director. The authority for employment of an "executive secretary" and of all necessary employees is granted by A.R.S. § 32-3403 to the Board, effective June 30, 1990. Laws 1989 (1st Reg. Sess.) Ch. 296, § 10. Thus, an advisory committee has no power to employ on the Board's behalf any person prior to the Board's creation on the effective date of the legislation.

You have asked whether individuals participating on an advisory committee appointed by the Governor would be eligible to receive reimbursement for travel expenses incurred in the 1989-90 fiscal year from the \$25,000 start-up costs appropriated to the Board for fiscal year 1990-91. See Laws 1989 (1st Reg. Sess.) Ch. 296, § 11. A.R.S. § 41-106 provides that "[m]embers of an advisory board established by the governor are eligible, subject to legislative appropriation, for reimbursement of expenses pursuant to Title 38, Chapter 4, Article 2." (Emphasis added.) Because the Legislature has not appropriated funds for start-up costs involved with the establishment of the Board until June 30, 1990, expenses incurred by advisory committee members prior to that time (even if such expenses could be paid from monies appropriated to the Board), cannot be reimbursed from the Board's start-up costs. Crane v. Frohmiller, 45 Ariz. 490, 495-496, 45 P.2d 955, 958 (1935) (the legislature has supreme authority over matters of appropriations). If, however, the Governor has within her budget available monies appropriated for such expenses, committee members could be reimbursed from that alternative source. See Webb v. Frohmiller, 52 Ariz. 128, 79 P.2d 510 (1938); Wiggins v. Kerby, 44 Ariz. 418, 38 P.2d 315 (1934); Ariz. Att'y. Gen. Op. No. 75-207.

You have also inquired whether proceedings by an advisory committee are subject to Arizona's Open Meeting Law. A.R.S. § 38-431.01(A) provides that "[a]ll meetings of any

public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings."

A "public body," for purposes of the Open Meeting Law, includes "all boards and commissions of the state and political subdivisions, all multi-member governing bodies of departments, agencies, institutions and instrumentalities of the state" A.R.S. § 38-431(5) (Emphasis supplied). Consequently, the Governor's advisory committees are subject to the Open Meeting Law if they are "boards," "commissions" or "governing bodies of . . . instrumentalities" of the state. These statutory words and phrases will be given their ordinary meaning unless the context of the statute indicates otherwise. A.R.S. § 1-213; State v. Wise, 137 Ariz. 468, 470 n.3, 671 P.2d 909, 911 n.3 (1983). Such ordinary meaning may be supplied by reference to a widely respected dictionary. *Id.*

A "board," as it is used in the context of § 38-431(5), is defined as follows:

A committee of persons organized under authority of law in order to exercise certain authorities, have oversight or control of certain matters, or discharge certain functions or a magisterial, representative, or fiduciary character. . . .

Black's Law Dictionary 157-158 (5th ed. 1979). The term "commission" means:

. . . A board or committee officially appointed and empowered to perform certain acts or exercise certain jurisdiction of a public nature or relation; as a "Public Service Commission."

Black's Law Dictionary 246 (5th ed. 1979). Finally, an "instrumentality" of government is recognized as an entity organized for and used by the government in the operation of its governmental functions. O'Neil v. Valley National Bank of Phoenix, 58 Ariz. 539, 540-541, 121 P.2d 646, 646 (1942).

Based upon the plain meaning of the statute and upon our duty to construe the statute "in favor of open and public meetings," A.R.S. § 38-431.09, we conclude that Governor's advisory committees are "public bodies" which must comply with the provisions of the Open Meeting Law. Such committees are organized pursuant to law and are appointed by the Governor to perform functions within the Executive Department of state government. A.R.S. § 41-106. The committees are subject to the same supervisory authority of the Governor as other multi-member

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boards within the Executive Department, Arizona Constitution article V, § 4, and, thus, are required to make special reports as directed by the Governor concerning matters of public interest, A.R.S. § 41-101(A)(9). Consequently, such committees are governing bodies organized pursuant to law to perform or discharge certain functions of the state government. Therefore, we conclude that the Governor's advisory committees function as boards, commissions or governing bodies of instrumentalities of the state and constitute "public bodies" for purposes of the Open Meeting Law. A.R.S. § 38-431(5).

Finally, you have asked whether the Governor may appoint members of the advisory committee to the Board of Occupational Therapy Examiners itself. We conclude that there is no legal impediment to such appointments merely arising out of having previously served on the advisory committee. We note, however, that only the Board, when duly constituted, has the power to exercise authority granted by the Legislature, and it cannot be bound by actions of the advisory committee. See A.R.S. § 38-442 (persons may not exercise a function of a public office without taking the oath of and giving the required bond for the public office).

In summary, we conclude that, although members of the Occupational Therapy Examiners Board may not be appointed prior to June 30, 1990, the Governor may appoint an advisory board or committee to assist in drafting tentative rules and a budget for the Board. However, the Governor may not fill the position of Executive Director for the Board prior to the effective date of the legislation. We also conclude that individuals serving on the advisory committee would not be permitted to receive reimbursement for travel expenses incurred in 1989-1990 from the \$25,000 start-up costs appropriated by legislation to the Board for fiscal year 1990-91, pursuant to Laws 1989 (1st Reg. Sess.) Ch. 296, § 11. We conclude that proceedings by the advisory board are subject to Arizona's Open Meeting Law, A.R.S. § 38-431 to -431.09, and that the Governor may subsequently appoint members of an advisory board to the Occupational Therapy Examiners Board.

Sincerely,



BOB CORBIN
Attorney General

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